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Is there a limit to the outer limits of ICSID jurisdiction?

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Article 25 of the ICSID Convention, which draws the outer limits for the exercise of ICSID jurisdiction, does not define the concepts of "nationality" and "investment." Aaron Broches, the principal author of the Convention, explains that this reflects a deliberate decision by the drafters to leave the choice of what constitutes an investment and who qualifies as an investor to the ICSID Member States. This wide latitude was taken to heart by most States, and there is no modern bilateral investment treaty that fails to fill the intentional gap in the ICSID Convention.

However, this understanding is increasingly being questioned by ICSID arbitrators, who find time and again that the ICSID Convention imposes certain objective jurisdictional criteria which may override the elaborate treaty definitions. Interpreting the terms that are intentionally left undefined, they put the clothes on the naked king, turning a blind eye to the fact that the States may have already done so in their treaties.

For example, drawing inspiration from the so-called "Salini test," a tribunal-created four-step objective assessment of what constitutes an investment, the tribunal in Phoenix v. The Czech Republic discerned six elements that distinguish a mere contribution of value from an investment under Article 25 of the ICSID Convention: "(i) a contribution in money or other assets; (ii) a certain duration; (iii) an element of risk; (iv) an operation made in order to develop an economic activity in the host State; (v) assets invested in accordance with the law of the host State; (vi) assets invested bona fide." Award at ¶ 114. To the tribunal, the treaty definition of investment is "acceptable" as long as it "fits within the ICSID notion." Id. at ¶ 96. Against this interpretive backdrop, the tribunal ultimately denied jurisdiction under the sixth prong above, finding that the purchase of two Czech companies by an Israeli investor was not a good faith investment but "simply a rearrangement of assets within a family, to gain access to ICSID jurisdiction to which the initial investor was not entitled." Id. at ¶¶ 140, 142.

Turning to the concept of "nationality," the majority in TSA v. Argentina held that the criterion of "foreign control" in Article 25(2)(b) of the ICSID Convention imposes an objective limit beyond which the tribunal's jurisdiction cannot extend, even where a specific agreement between the States exists. Decision at ¶ 134. To the majority, the veil of a corporate entity must be pierced in order to determine whether it is genuinely foreign controlled. Moreover, this piercing should not "stop short at the second corporate layer it meets, rather than pursuing its objective identification of foreign control up to its real source, using the same criterion with which it started." Id. at ¶ 147. Peering beyond the Dutch ownership of the Argentine claimant, the majority denied jurisdiction because the latter was ultimately controlled by an Argentine citizen. Id. at ¶ 162. The dissenting

arbitrator disagreed, arguing that the treaty definition of nationality must control and that the "limit sovereignty imposes on how international law is made, enjoins [arbitrators] to vindicate, rather than ignore, the agreements reached by two states." Dissenting Opinion at ¶ 34.

Joining the dissenting arbitrator on the other side of the interpretive fence are the annulment committee in MHS v. Malaysia and the tribunal in Rompetrol v. Romania.

In MHS v. Malaysia, the majority of the ICSID ad hoc annulment committee annulled an award on jurisdiction issued by the MHS tribunal on the ground that the latter "manifestly exceeded" its powers by failing to exercise jurisdiction under the ICSID Convention and the UK-Malaysia bilateral investment treaty. Annulment Decision at ¶ 80. To recall, using the same Salini test as the Phoenix tribunal, the MHS tribunal denied jurisdiction because the claimant's failure significantly to contribute to Malaysia's economic development disqualified its contract with Malaysia from becoming an investment within the meaning of Article 25(1) of the ICSID Convention. Tribunal's Award at ¶ 146. The treaty definition of investment was thought to be insufficient to confer jurisdiction. Id. at ¶ 148. On annulment, the majority sharply disagreed with the tribunal and ruled that,

It is those bilateral and multilateral treaties which today are the engine of ICSID's effective jurisdiction. To ignore or depreciate the importance of the jurisdiction they bestow upon ICSID, and rather to embroider upon questionable interpretations of the term "investment" as found in Article 25(1) of the Convention, risks crippling the institution. Annulment Decision at ¶ 73.

One annulment committee member dissented, developing a case for significant contribution to the host State's economy that must be made for an investment to exist. Dissenting Opinion at ¶ 4.

Turning once again to the concept of "nationality," a year earlier, the tribunal in Rompetrol v. Romania ruled that the treaty definition of nationality – "the only safe guide to [the States'] intentions" – gives meaning and content to the outer limits of ICSID jurisdiction. Decision at ¶ 107. It observed that, on a deeper level, is was "not persuaded that there is anything in the rules of treaty interpretation that would justify giving the ICSID Convention overriding effect for the interpretation of the BIT." Id. The tribunal therefore held that because the claimant, a Dutch corporation, met the definition of nationality under the Netherlands-Romania bilateral investment treaty, despite the fact that it may have been ultimately controlled by Romanian nationals, personal jurisdiction must be upheld. Id. at ¶ 110.

These cases demonstrate a deepening divide between the two schools of thought of treaty interpretation. While some arbitrators (coined by the TSA majority as "strict constructionists") limit a jurisdictional inquiry to the specific terms of an agreement between the sovereigns, others fill the outer limits of ICSID jurisdiction with an independent meaning derived not from the text but from the raison d'etre of the ICSID regime. What may appear to some as a dry legal difference between textual and teleological interpretation of the ICSID Convention may have a significant, real and immediate impact on investors considering their options in making and structuring investments. Indeed, there are signs that the benefits of a BIT jurisdiction are beginning to fade in the blinding light of an ICSID jurisdictional scrutiny.

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